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1. RECENT DEVELOPMENT*: EVIDENCE: Evidence: Hearsay Exceptions--Confrontation Clauses, * Decisions editorially summarized as nationally reported through March 2006. Our editorial summaries in this Recent Developments Section will emphasize subjects of direct interest to advocacy practitioners and academics. Citation style has been adapted for these purposes. For information about a case’s procedure, pleadings, and other subjects, you should read the case directly., 35 Stetson L. Rev. 1134

Client/Matter: -None-

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Evidence: Hearsay Exceptions - Confrontation Clause

Belvin v. State,
922 So.2d 1046 (Fla. 4th Dist. App. 2006)

_Breath test_ affidavits are testimonial in nature. Thus, they may not be introduced in a criminal proceeding unless the affiant testifies in court or the affiant is unavailable and the defendant had a prior opportunity to cross-examine him or her.

FACTS AND PROCEDURAL HISTORY

Bruce Belvin was arrested for driving under the influence (DUI) and taken to a _breath testing_ facility, where he submitted to a _breath test_ that measured alcohol levels of 0.165, 0.144, and 0.150. At Belvin’s non-jury trial in county court, the State introduced a _breath test_ affidavit that was signed by both the arresting officer and the _breath test_ technician, who administered the _test_ and prepared the affidavit. Because the technician did not testify at trial, Belvin objected to the introduction of the _breath test_ affidavit, asserting a violation of his Sixth Amendment confrontation rights under _Crawford v. Washington, 541 U.S. 36 (2004)._ The trial court overruled Belvin’s objection and admitted the affidavit into evidence. Belvin was then convicted of DUI.

Belvin appealed his conviction to the Circuit Court for the Fifteenth Judicial Circuit in its appellate capacity. The Fifteenth Circuit initially reversed Belvin’s conviction, but it affirmed the conviction on rehearing, finding that the _breath test_ affidavit was not testimonial. Belvin then filed a petition for writ of certiorari with the Fourth District Court...
of Appeal. The Fourth District granted certiorari, quashed the Fifteenth Circuit’s decision, and certified the question about the testimonial nature of certain portions of breath test affidavits as one of great public importance.

**ANALYSIS**

In his petition for writ of certiorari, Belvin claimed that the circuit court’s decision violated a clearly established principle of law because it held that breath test affidavits were not testimonial. Although the State argued that statutes and precedent supported the trial court’s decision to admit the breath test affidavit, the Fourth District recognized that recent controlling developments in constitutional law - the United States Supreme Court’s decision in Crawford - constituted clearly established principles. Belvin, 922 So. 2d at 1049. In Crawford, the Court ruled that an out-of-court testimonial statement “is inadmissible in criminal prosecutions unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness,” regardless of the statement’s reliability. Id. at 1048. The State argued that the breath test affidavit was not testimonial in nature and, even if it were, Belvin had a prior opportunity to cross-examine the breath test technician.

First, the State argued that breath test affidavits are not testimonial in nature and thus are not subject to Crawford’s strict restrictions on the admission of testimonial evidence. Although the Crawford opinion lists affidavits as being within the core class of testimonial statements, the State argued that breath test affidavits are different because they “simply involve the technician’s observations,” not a “give-and-take of questions and answers.” Id. at 1050. The Fourth District rejected this distinction because a breath test affidavit contains the technician’s personal observations regarding the examination period, testing procedures, and inspection of the testing instrument. Moreover, the State argued that breath test affidavits are not testimonial because Florida Statutes Sections 316.1934(5) and 90.803(8) expressly include breath test affidavits in the hearsay exception for public records and reports. The court rejected this argument as well, indicating that a statutory listing does not control the constitutional question as to whether breath test affidavits are testimonial. Reasoning that the purpose of a breath test affidavit is for later use at a criminal trial or driver’s license revocation proceeding, the Fourth District found that the breath test affidavit was testimonial in nature and that Crawford thus applied. Id. at 1050-1051. In doing so, the Fourth District specifically acknowledged that Crawford abrogated the court’s decision in Gehrmann v. State, 650 So. 2d 1021 (Fla. 4th Dist. App. 1995), which concluded that a breath test affidavit is admissible in its entirety under Section 316.1934(5). The court further indicated that its holding was consistent with recent decisions from the First District Court of Appeal and other jurisdictions outside of Florida.

Second, the State argued that, even if breath test affidavits were testimonial in nature, the admission of the affidavit in this case was proper because the breath test technician was unavailable and Belvin had a previous opportunity to cross-examine her prior to trial. The State argued that, under Florida Rule of Criminal Procedure 3.220(h)(1)(D), Belvin could have sought to depose the breath test technician before trial after showing good cause to the trial court. The State cited Blanton v. State, 880 So. 2d 798, 801 (Fla. 5th Dist. App. 2004), for the proposition that discovery depositions ordinarily qualify as a prior opportunity for cross-examination, for purposes of Crawford. The Fourth District, however, cited to a conflicting First District decision, Lopez v. State, 888 So. 2d 693, 701 (Fla. 1st Dist. App. 2004), in which the First District disagreed with the Fifth District’s holding in Blanton. In addition, the court noted that it had recently certified conflict with Blanton in Contreras v. State, 910 So. 2d 901 (Fla. 4th Dist. App. 2005). The Fourth District agreed with the First District’s reasoning in Lopez that finding that a discovery deposition satisfies the right to confrontation would lead to a slippery slope that could render the Supreme Court’s constitutional requirements in Crawford meaningless. Because a discovery deposition “does not offer the kind of opportunity the Court was referring to in Crawford,” the Fourth District rejected the State’s argument that Belvin had a prior opportunity to cross-examine the technician before trial. Belvin, 922 So. 2d at 1053.

The Fourth District concluded that the breath test affidavit was testimonial in nature and that Belvin had no prior opportunity to cross-examine the breath test technician before trial. Because the admission of the breath test affidavit violated Belvin’s Sixth Amendment right to confront witnesses against him, the court granted certiorari and quashed the circuit court’s decision.

**SIGNIFICANCE**

As a practical matter, the Fourth District’s decision means that, in most instances, a breath test affidavit signed by a breath test technician will not be admissible unless the breath test technician testifies in court. Thus, prosecutors

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will be forced to take steps to ensure that breath test technicians who sign affidavits will be available to testify in court during the criminal prosecution of DUI offenders.

As a matter of Sixth Amendment jurisprudence, this decision provides the Fourth District’s interpretation of two Confrontation Clause issues under Crawford. First, the court’s determination that breath test affidavits are testimonial in nature is significant because it relied on the language in Crawford that indicates that affidavits are testimonial in nature. In light of the court’s rejection of the State’s argument that breath test affidavits are fundamentally different than the affidavits that were referenced in Crawford, practitioners may argue that any affidavit is per se testimonial. Second, the court’s determination that discovery depositions do not constitute an opportunity to cross-examine a witness exacerbates the current split between Florida’s district courts of appeal. As more district courts weigh in on the issue, it becomes more likely that the Florida Supreme Court may exercise its jurisdiction to resolve the conflict.

RESEARCH REFERENCE


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